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Supreme Court of the United States

OCTOBER TERM, 1955

No. 815

DONALD C. BARNES, TRUSTEE IN DISSOLUTION FOR ENGINEERS PUBLIC SERVICE COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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Dated March 30, 1956.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

I.

OPINION BELOW

The opinion of the Court of Claims is reported in 137 F. Supp. 716. A copy of the opinion is appended as Exhibit A.

II.

JURISDICTION

The judgment of the Court of Claims was entered on January 31, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. §§ 1255(1) and 2101.

III.

QUESTION PRESENTED

Can a cause of action to recover interest on a tax refund credit exist at a time when the defendant is prohibited by statute from making the credit?

IV.

STATUTES INVOLVED

The statute principally involved follows:

> "No refund or credit of any income, war-profits, excess-profits, estate, or gift tax in excess of $75,000 shall be made until after the expiration of thirty days from the date upon which a report giving the name of the person to whom the refund or credit is to be

made, the amount of such refund or credit, and a summary of the facts and the decision of the Commissioner is submitted to the Joint Committee on Internal Revenue Taxation." (Section 3777(a) of the Internal Revenue Code of 1939 as in effect at the time, 26 U. S. C. §3777(a); *cf.* §6405(a) of the Code of 1954)

The other statutes involved are the six-year statute of limitations applicable to petitions in the Court of Claims (28 U. S. C. §2501), and sections of the Internal Revenue Code of 1939 relating to the allowance of credits and the period for the running of interest (§§3770(a)(3) and §3771(a) and (b)(1)). They appear in Exhibit B.

V.

STATEMENT OF THE CASE

The taxpayer, Engineers Public Service Company, underpaid its income taxes for 1942, 1943, 1944 and 1945 but overpaid its excess profits taxes for 1942 and 1943. The overpayments exceeded the deficiencies. All proper claims for refund were filed. A refund was paid to the taxpayer, including principal and interest. The amount was more than $75,000. The taxpayer asserted that the interest was improperly computed and brought this action to recover additional interest.

Admittedly the six-year statute of limitations governs; the question here is when it began to run.

These are the critical dates:

April 20, 1949

Report of credit submitted by the Commissioner to the Joint Committee on Internal Revenue Taxation.

May 4, 1949
Commissioner signed schedule of overassessments.

May 20, 1949
The thirty-day period provided by §3777(a) expired.

July 12, 1949
Date of refund check.

July 21, 1949
Commissioner mailed to the taxpayer a statement showing a computation of the refund and the interest allowed, the taxpayer's first knowledge as to the amount of interest allowed.

May 6, 1955
The taxpayer filed its petition in the Court of Claims to recover additional interest.

The facts as to the interest claim are not relevant here except that it may be noted that the taxpayer's case is almost identical with another recent case in which the taxpayer was successful. *Virginia Electric and Power Co.* v. *United States*, 126 F. Supp. 178 (Ct. Cls. 1954).

The United States moved to dismiss in the court below on the ground that the cause of action arose on May 4, 1949 (when the schedule of overassessments was signed) and was therefore barred by the statute of limitations. This motion was sustained even though it results in a holding that a cause of action arose at a time when the defendant was prohibited by law from making the payment in question and two and a half months before the taxpayer knew that the Commissioner had computed the amount in question in an erroneous manner.

VI.

REASONS FOR GRANTING THE WRIT

1.

The Decision Below Is in Conflict With a Decision of This Court

It will be recalled that the Commissioner signed the schedule of overassessments on May 4, 1949. The court below held that the cause of action arose on that day. Yet the Commissioner was prohibited by law from making payment on that day and at all times thereafter until May 20, 1949. Thus the Court below held that a cause of action arose at a time when the defendant was not only *not required* to pay the claim but when he was *prohibited* from paying.

The case is an even stronger one for the plaintiff than that decided for the plaintiff by this Court in *Rawlings* v. *Ray*, 312 U. S. 96 (1941). There an assessment was levied by the Comptroller of the Currency against stockholders of a national bank on November 6, 1935. The stockholders were required to pay on or before December 13, 1935. A three-year statute of limitations applied. Suit was brought on December 7, 1938. This Court reversed a holding of the court below that the suit was brought too late. Mr. Chief Justice Hughes spoke for a unanimous Court when he said:

> "While the assessment was made on November 6, 1935, it was expressly made payable on or before December 13, 1935. Respondent was allowed until that date to pay and prior thereto suit could not be maintained against him. Hence the statute of limitations did not begin to run until December 13, 1935, and the suit was in time." (312 U. S. at p. 98)

Thus a cause of action does not arise until the defendant is required to pay. But the court below held here that the

cause of action arose at a time when the defendant could not pay because the statute said that he was not to pay until thirty days after he filed his report with the Joint Committee. This is all the more true because a claim for interest can certainly never arise until a claim can be made for the principal amount on which the interest is determined.

The decision of the Court of Claims is thus squarely in conflict with the decision of this Court in *Rawlings* v. *Ray*.

2.

The Decision Below Is in Conflict With the Only Applicable Prior Federal Decision

There appears to be only one decision at all relevant in interpreting the effect of the statutory requirement of report to the Joint Committee and prohibition of payment until thirty days have passed: *The Ohio Oil Co.* v. *United States*, 36-2 U. S. T. C. ¶ 9415 (N. D. Ohio 1936). In that case the United States took a position that appears to be exactly the reverse of its position here.

The facts there may be simply stated. The taxpayer was entitled to refund with interest; the Commissioner signed the final audit letters on December 7, 1928, and apparently reported to the Joint Committee at the same time. The question was whether the interest on the refund was income for 1928 or 1929.

The interest was taxable income when the right to receive it became fixed. *Spring City Foundry Co.* v. *Commissioner*, 292 U. S. 182 (1934). The taxpayer urged that the right to receive the interest became fixed on December 7, 1928, since the Joint Committee is not given any authority to require that payment be withheld. But the United States urged an opposite result and was sustained by the court. It said:

> "It is said that the Joint Congressional Committee had no right to redetermine the amount of the refund or credit or to change it in any way. A reading of the statute creating the Joint Congressional Committee confirms this view. See 26 USCA §1274. However, Congress must have had some purpose in staying the hand of the Commissioner for a period of thirty days, and certainly if the Committee had suggested proper corrections, the suggestions would have been accepted by the Commissioner. The effect of the statute, I think, was to deprive the Commissioner's letter of December 7, 1928 (Ex. 4), during the thirty-day period, of the finality to which otherwise it might have been entitled." (36-2 U. S. T. C. at p. 10,124)

So the right to receive the interest did not become fixed until after the thirty-day period elapsed. Certainly, therefore, no cause of action arose until the right became fixed. It is clear, we submit, that the decision of the court below is in square conflict with this decision of the District Court in the only other relevant case where the effect of the report to the Joint Committee has been considered.

Reliance by the court below on *Colgate-Palmolive-Peet Co.* v. *United States*, 58 F. 2d 499 (Ct. Cls. 1932), is, we may point out, misplaced since that case did not concern the question presented here. There are two reasons for this conclusion. First, as the court itself said in the *Colgate* case, it was decided under the peculiar provisions of the Revenue Act of 1921 specifying that the date of allowance of the claim was the critical date; the statute in the present case is quite different and gives no such sanctity to the action of allowance. But, more importantly, the *Colgate* decision was not concerned in any way with a report to the Joint Committee; no mention of such a report is made in the opinion. At the time under consideration there, no requirement existed for a report to the Joint Committee.

That case arose under the Revenue Act of 1921; the report to the Joint Committee was first introduced in the Revenue Act of 1928. The decision there was of a different question under a different statute and on different facts from those presented here. That case is not a precedent here.

In result, we reiterate that the decision below is in square conflict with the only case where the question has been previously considered.

3.

The Question Is One of Importance in the Administration of the Revenue Laws

This is not a question that is rare or nonrecurring. It is not limited to questions arising as to excess profits or other taxes that are no longer in effect. The same question may well arise as to interest on any claim for refund as to income taxes for any year today.

Section 6405(a) of the Internal Revenue Code of 1954 is, with one exception, identical with §3777(a) of the 1939 Code quoted above. The only difference is that the amount of refund as to which a report is required has been increased to $100,000.

What this means is that the Commissioner may assert as to each claim for refund made now that a cause of action for a claim arises at a time when the statute says that he shall not pay the claim. He may assert, as did the court below here, that he has the power to shorten the period of limitations to five years and eleven months. But he should not be permitted to change an act of Congress by arbitrary administrative action. Congress has established the period at six years; it is for Congress and not the Commissioner or the court below to shorten the period

Since this same question may arise as to any claim for more than $100,000 now pending or that may arise in the future, it is important that this court establish that the statute of limitations means what it says and that a cause of action cannot exist when it is, in effect, prohibited.

VII.

CONCLUSION

The decision of the Court of Claims in this case relates to a matter of substantial importance in the administration of the internal revenue laws. The decision conflicts with a decision of this Court and a decision of another Federal court that is almost a direct precedent. The position of the United States in these cases has been one of substantial inconsistency.

Accordingly, the decision below is one which should be reviewed by this Court and the writ sought by this petition should be granted.

Dated March 30, 1956.

Respectfully submitted,

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Exhibit A

OPINION OF THE UNITED STATES COURT OF CLAIMS

January 31, 1956

LARAMORE, *Judge,* delivered the opinion of the court:

The plaintiff sues to recover interest on a portion of an overpayment of excess profits tax for the year 1942 credited against income tax deficiencies for the years 1942, 1943, and 1945. The case is before this court on defendant's motion to dismiss on the ground that the suit is barred by the six-year statute of limitations embodied in 28 U. S. C. § 2501.[1] The sole issue presented on this motion is when did plaintiff's cause of action accrue.

The plaintiff duly filed consolidated income and excess profits tax returns and paid the tax shown thereon for the years 1942, 1943, 1944, and 1945. After adjustments to the income and excess profits tax liability of the plaintiff, including the carryback of an unused excess profits tax credit from 1944 and 1945, the Commissioner of Internal Revenue determined deficiencies in income taxes for the years 1942, 1943, 1944, 1945 and overassessments in excess profits taxes for the years 1942 and 1943.

On May 19, 1948, the plaintiff filed a waiver consenting to the assessment and collection of the income tax deficiencies and accepting the overassessments in excess profits tax. The Commissioner of Internal Revenue charged interest on the income tax deficiencies and allowed interest on that part of the 1942 excess profits overpayment credited against the

[1] "Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed, or the claim is referred by the Senate or House of Representatives, or by the head of an executive department within six years after such claim first accrues. * * *"

deficiencies to June 19, 1948, 30 days after the filing of the waiver. The income tax deficiencies were assessed on July 22, 1948. This suit is for interest on that part of the overpayment that was credited against the deficiencies, for the period from June 19, 1948, 30 days after the filing of the waiver, to July 22, 1948, date of the assessment of the deficiencies against which the overpayment was credited.

On April 20, 1949, the Commissioner of Internal Revenue submitted his report to the Joint Committee on Internal Revenue Taxation, pursuant to the provisions of section 3777(a)[2] of the Internal Revenue Code. On May 4, 1949, the Commissioner signed the schedule of overassessments relating to the plaintiff's 1942 excess profits tax overpayment. On May 20, 1949, the 30 days from the date the Commissioner submitted his report to the Joint Committee expired. The date of the refund check was July 12, 1949, and the certificate of overassessment showing the details of the credit and refund of the 1942 overpayment of excess profits tax and interest allowances with respect thereto, was mailed on July 21, 1949. The plaintiff filed its petition in this court on May 6, 1955.

A statute of limitations on a suit for interest is not specifically covered by the Internal Revenue Code. Therefore, a suit for interest is founded on this court's general jurisdiction and is governed by our six-year statute of limitations.

The defendant contends that plaintiff's cause of action for the interest here sought accrued on May 4, 1949, the date that the Commissioner signed the schedule of overassess-

[2] "No refund or credit of any income, war-profits, excess-profits, estate, or gift tax in excess of $75,000 shall be made until after the expiration of thirty days from the date upon which a report giving the name of the person to whom the refund or credit is to be made, the amount of such refund or credit, and a summary of the facts and the decision of the Commissioner is submitted to the Joint Committee on Internal Revenue Taxation."

ments for the refund of the 1942 excess profits tax overpayment because the refund was allowed by section 3770(a)(3)[3] at that time. The plaintiff contends that its cause of action did not accrue until May 20, 1949, because the Commissioner was prohibited by section 3777(a) from making payment before that time and, therefore, it could not have commenced a suit before that date.

We agree with the defendant's position. It was early pointed out that a cause of action for interest does not accrue until the refund or credit is allowed. *Colgate-Palmolive-Peet Co.* v. *United States*, 74 C. Cls. 562, 570. There was some difficulty in ascertaining the date when the refund or credit was allowed. Congress clarified this problem and specifically provided by section 3770(a)(3) that the date of the allowance of the refund or credit was the date the Commissioner signed the schedule of overassessments. The plaintiff contends that since the Commissioner could not refund or credit the overpayment until 30 days after the submission of the report to the Joint Committee, its cause of action for the interest did not accrue until that time. This is incorrect. When the Commissioner signed the schedule of overassessments on May 4, 1949, plaintiff's credit was allowed and its cause of action for interest due on this credit matured and accrued at that time. *Colgate-Palmolive-Peet Co.* v. *United States, supra.* The submission of the report to the Joint Committee was not intended to and does not suspend the plaintiff's right to sue for the interest.

We hold that the cause of action for interest accrues on the date of the allowance of the credit. This date was May

[3] "Where the Commissioner has signed a schedule of overassessments in respect of any internal revenue tax imposed by this title, the Revenue Act of 1932, or any prior Revenue Act, the date on which he first signed such schedule (if after May 28, 1928) shall be considered as the date of allowance of refund or credit in respect of such tax."

4, 1949, and since plaintiff's petition was not filed until May 6, 1955, its cause of action is barred by the statute of limitations. The fact that plaintiff was not notified of the Commissioner's action until after July 21, 1949, does not prevent the accrual of its cause of action for interest on an allowed refund or credit. The plaintiff had five years and nine months within which to sue after it received the certificate of overassessment showing the details of the credit and refund and the interest with respect thereto. This is more time than is allowed for a suit for the principal amount.

The defendant's motion is granted, and plaintiff's petition is dismissed.

It is so ordered.

MADDEN, *Judge;* WHITAKER, *Judge;* LITTLETON, *Judge;* and JONES, *Chief Judge,* concur.

Exhibit B

OTHER RELEVANT STATUTES

28 U. S. C. § 2501:

> "Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues."

Internal Revenue Code of 1939, § 3770(a)(3):

> "Where the Commissioner has signed a schedule of overassessments in respect of any internal revenue tax imposed by this title, the Revenue Act of 1932, or any prior revenue Act, the date on which he first signed such schedule (if after May 28, 1928) shall be considered as the date of allowance of refund or credit in respect of such tax." (26 U. S. C. § 3770(a)(3))

Internal Revenue Code of 1939, § 3771(a) and (b)(1):

> "(a) *Rate.* — Interest shall be allowed and paid upon any overpayment in respect of any internal revenue tax at the rate of 6 per centum per annum.
>
> "(b) *Period.* — Such interest shall be allowed and paid as follows:
>
> (1) *Credits.* — In the case of a credit, from the date of the overpayment to the due date of the amount against which the credit is taken, but if the amount against which the credit is taken is an additional assessment of a tax imposed by the Revenue Act of 1921, 42 Stat. 227, or any subsequent Revenue Act, then to the date of the assessment of that amount." (26 U. S. C. § 3771(a) and (b)(1))